Supreme Court, U.S.
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No. 95-609

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT H. HOPKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 309(c)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. 1319(c)(2)(A) (Supp. V 1993), which establishes criminal penalties for any person who "knowingly violates * * * any permit condition or limitation" governing the discharge of pollutants into navigable waters, requires proof that the defendant knew that his conduct was in violation of the statute or the applicable permit.

2. Whether Section 309(c)(4) of the CWA, 33 U.S.C. 1319(c)(4), which establishes criminal penalties for any person who "knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under" the CWA, requires proof that the defendant knew his conduct to be unlawful.

3. Whether a conviction under 18 U.S.C. 371 for conspiring to violate Sections 1319(c)(2)(A) and 1319(c)(4) requires proof that the defendant knew that his conduct violated the statute or the applicable permit.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 53 F.3d 533.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1995. A petition for rehearing was denied on July 18, 1995. Pet. App. 23-24. The petition for a writ of certiorari was filed on October 16, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of knowingly violating the restrictions of a discharge permit issued pursuant to the Clean Water Act, in violation of 33 U.S.C. 1319(c)(2)(A) (Supp. V 1993); one count of knowingly falsifying, tampering with, or rendering inaccurate a monitoring device required to be maintained pursuant to the Act, in violation of 33 U.S.C. 1319(c)(4); and one count of conspiracy to violate Sections 1319(c)(2)(A) and 1319(c)(4), in violation of 18 U.S.C. 371. He was sentenced to 21 months' imprisonment, to be followed by two years of supervised release, and was fined $7,500. The court of appeals affirmed. Pet. App. 1-22.

1. The Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, governs the discharge of pollutants into navigable waters. It is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 402 of the Act, 33 U.S.C. 1342, provides for the issuance of National Pollutant Discharge Elimination System (NPDES) permits either by the federal government through the Environmental Protection Agency (EPA), see 33 U.S.C. 1342(a), or by individual States that have received EPA approval to operate a permitting system in lieu of the federal program, see 33 U.S.C. 1342(b) and (c).[1] Persons authorized by a permit to discharge

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[1] Both state and federal permits must meet the same requirements. 33 U.S.C. 1342(a)(2) and (b). States with approved programs are authorized to issue and enforce CWA permits. 33 U.S.C. 1342(b). The EPA may also enforce the provisions of state-issued permits. 33 U.S.C. 1319(a).

specified pollutants may discharge only the amounts of the pollutants that the permit allows. Pollutant discharges in excess of the quantities specified in the permit are prohibited by Section 301 of the Act, 33 U.S.C. 1311. Any person who "knowingly violates section [301], * * * or any permit condition or limitation * * * in a permit issued under [33 U.S.C. 1342]," is subject to criminal fines of up to $50,000 per day of violation and may be imprisoned for up to three years. 33 U.S.C. 1319(c)(2)(A) (Supp. V 1993).

NPDES permits generally require the permittee to monitor the discharges made under a permit and to report its discharge monitoring results. To prevent evasion of those requirements, Congress established criminal penalties for any person who "knowingly makes any false material statement * * * in any * * * report * * * filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter." 33 U.S.C. 1319(c)(4).

2. Petitioner was the vice president for manufacturing of Spirol International Corporation. Pet. App. 3. Spirol's manufacturing process for metal shims and fasteners involved a zinc-based plating process. *Ibid.* That process generated wastewater containing zinc and other toxic materials. *Ibid.* Spirol discharged the wastewater into the nearby Five Mile River, a navigable waterway. *Ibid.* The State of Connecticut—which has an EPA-approved CWA program, see note 1, *supra*—entered into a consent order with a corporate predecessor of Spirol. Pet. App. 3. The state consent order addressed past CWA violations caused by unauthorized discharges of zinc. *Ibid.* The order, which petitioner signed on

behalf of the company, required Spirol to pay a $30,000 fine and to comply with the discharge limitation established in the order. *Ibid.* In February 1989, the State issued a modified permit, which imposed more stringent limitations on the level of zinc and other pollutants that Spirol could legally discharge. *Ibid.* Petitioner had corporate responsibility for ensuring the company's compliance with the consent order and the modified permit. *Ibid.*

The permit required Spirol to send a sample of its wastewater to an independent laboratory by Friday of each week. Pet. App. 4. Under the permit, concentrations of zinc in the wastewater were not to exceed 2.0 milligrams per liter in any one sample, and the average concentration in any month was not to exceed 1.0 milligram per liter. *Ibid.* During the relevant period, Spirol employees took a sample of the wastewater at the beginning of each week. *Ibid.* When a sample exceeded 1.0 milligram of zinc per liter of wastewater, petitioner directed Spirol employees to discard the sample and to take a new one the next day. *Id.* at 4-5. If that sample also proved unsatisfactory, petitioner sometimes ordered that it be discarded and yet another sample be taken; more often, he instructed employees to alter the samples, either through dilution (using tap water) or filtration (using an ordinary paper coffee filter). *Id.* at 5. By Friday of each week, petitioner sent to the independent laboratory a sample meeting the permit's requirements. *Ibid.* One of Spirol's employees testified at trial that petitioner had caused the samples to be "tampered with" approximately "40 percent of the time." *Id.* at 6. Another employee testified that he had told petitioner that the company's testing procedures were improper. *Ibid.*

On the basis of the weekly reports, petitioner filed discharge monitoring reports with the State on a monthly basis from March 1989 to September 1990. Pet. App. 5. Consistent with the falsified samples sent to the lab, those monthly reports showed no discharges of zinc in excess of 1 milligram per liter. *Ibid.* Each monthly report contained the following certification signed by petitioner:

> I certify under penalty of law that this document and all attachments were prepared under by [*sic*] direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information. [*sic*] The information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Id. at 6. Although the test samples discarded or altered at petitioner's direction frequently showed zinc concentrations in excess of those authorized by the permit, Spirol continued to discharge wastewater into the river. *Id.* at 6-7.

3. Petitioner was charged in a three-count indictment, which alleged that he had (1) knowingly falsified or tampered with Spirol's discharge sampling methods, in violation of 33 U.S.C. 1319(c)(4); (2) knowingly violated the conditions of the state permit, in violation of 33 U.S.C. 1319(c)(2)(A) (Supp. V 1993); and (3) conspired to commit the two CWA offenses, in

violation of 18 U.S.C. 371. Pet. App. 7. With respect to the charge that petitioner had knowingly falsified or tampered with Spirol's sampling methods, the district court instructed the jury that "[i]t is not necessary for the government to prove that the defendant intended to violate the law or that the defendant had any specific knowledge of the particular statutory, regulatory or permit requirements imposed under the Clean Water Act." *Id.* at 8. Rather, the court stated, the government must prove "that the defendant acted voluntarily or intentionally to falsify, tamper with or render inaccurate a monitoring device or method and that he did not do so by mistake, accident or other innocent reason." *Ibid.* With respect to the alleged violation of Section 1319(c)(2)(A), the district court reiterated that "the government need not prove that the defendant intended to violate the law or that the defendant had any specific knowledge of the specific requirements of the conditions and limitations of the permit." Pet. App. 8. The district court also instructed the jury that the government had to prove beyond a reasonable doubt "that in taking actions or causing actions to be taken, in violation of the permit, [petitioner] acted voluntarily or intentionally and not by mistake, accident, ignorance of the facts, or for other innocent reason." *Ibid.* The district court refused to give petitioner's proposed instructions, which would have required the jury to find that petitioner had acted with knowledge that his conduct violated the CWA or the applicable permit. Pet. 12-13.

4. The court of appeals affirmed. Pet. App. 1-22. The court rejected petitioner's contention that Section 1319(c)(2)(A) requires proof that a defendant knew his actions to be in violation of the law. The

court stated that "in construing knowledge elements that appear in so-called 'public welfare' statutes—*i.e.*, statutes that regulate the use of dangerous or injurious goods or materials—the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful." Pet. App. 11. The court placed particular reliance (see *id.* at 11-12) on this Court's decision in *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558 (1971).

The court of appeals also noted that statutes regulating the disposal of hazardous substances have not generally been construed to require proof that a defendant knew his acts to be in violation of the law. Pet. App. 12-13. Rather, the courts have required the government to "prove only that the defendant knew the nature of the hazardous waste matter with which he dealt." *Id.* at 13. The court of appeals concluded that the CWA was similar in nature and purpose to those other environmental statutes, and that the Act's scienter requirement should therefore be similarly construed. *Id.* at 13-14.

The court of appeals found additional support for its decision in the 1987 amendments to the CWA. Before 1987, the court noted, "the substance of § 1319(c)(2)(A) appeared in § 1319(c)(1), which provided penalties for one who '*willfully* or negligently' violated that section." Pet. App. 14. Congress's replacement of the willfulness standard with a knowledge requirement, the court concluded, suggested an intent "to reduce the *mens rea* element of the prohibited acts." *Id.* at 15. The court also noted that the only other court of appeals to consider the question had concluded that Section 1319(c)(2)(A) does not require knowledge of illegality. Pet. App. 17 (citing *United States* v.

Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995)). In sum, the court concluded that, "in a prosecution under § 1319(c)(2)(A), the government was required to prove that [petitioner] knew the nature of his acts and performed them intentionally, but was not required to prove that he knew that those acts violated the [CWA], or any particular provision of that law, or the regulatory permit issued to Spirol." Pet. App. 18.

The court reached the same conclusion with respect to petitioner's conviction under Section 1319(c)(4). The court held that the word "knowingly" should be given the same construction in Section 1319(c)(4) as in Section 1319(c)(2)(A)—*i.e.*, as requiring knowledge of the nature of one's acts rather than knowledge that they violate the law. See Pet. App. 18-19. The court also concluded that, "[i]n light of our rejection of [petitioner's] contentions concerning the knowledge requirements of §§ 1319(c)(2)(A) and (c)(4), his similar challenge to the district court's instruction on the conspiracy count is also without merit." *Id.* at 19.

ARGUMENT

Petitioner contends that his convictions for violating 33 U.S.C. 1319(c)(2)(A) (Supp. V 1993) and 33 U.S.C. 1319(c)(4) and for conspiring to violate those provisions should be reversed because the jury was not instructed that "the term 'knowingly'" in Sections 1319(c)(2)(A) and (c)(4) "requires proof that the defendant had actual knowledge that his conduct violated the law." Pet. 14, 24. The court of appeals correctly held that those provisions do not impose such a heightened scienter requirement, and its decision accords with the holding of the only other

court of appeals that has addressed the issue. The holding is also consistent with this Court's approach to comparable "public welfare" offenses. See *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558 (1971). Further review is unwarranted.

1. There is no merit to petitioner's claim (Pet. 13-24) that Section 1319(c)(2)(A) requires proof that a defendant knew that his conduct was in violation of the law.

a. "The general rule that ignorance of the law or a mistake of law is no defense to a criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991); see also *International Minerals*, 402 U.S. at 563 (citing "[t]he principle that ignorance of the law is no defense"). This Court recently reaffirmed that "venerable principle" in *Ratzlaf* v. *United States*, 114 S. Ct. 655, 663 (1994).

Only on rare occasions has this Court interpreted criminal statutes to require the government to prove that the defendant was aware of the illegality of his conduct. Such statutes typically require the government to prove that the defendant acted "willfully." See, *e.g.*, *Ratzlaf*, 114 S. Ct. at 659-660; *Cheek*, 498 U.S. at 200-201; *United States* v. *Murdock*, 290 U.S. 389, 394-395 (1933). In the field of criminal tax law, for example, the word "willfully" is presumptively construed to "connote[] a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); see *Cheek*, 498 U.S. at 201. No such presumption attends Congress's use of the word "knowingly"; indeed, petitioner cites no case in which a statutory requirement that the defendant act

"knowingly" has been construed to require knowledge that his conduct violated the law.[2]

b. Settled law with respect to public welfare offenses like the one involved here also refutes petitioner's claim. In *International Minerals*, this Court determined the standard of proof required under the Explosives and Dangerous Articles Act, 18 U.S.C. 834(f) (1970), which subjected to criminal penalties any person who "knowingly violate[d] any * * * regulation" promulgated by the Interstate Commerce Commission for the safe transportation of corrosive liquids. The Court held that the government was not required to prove the defendant's knowledge of the pertinent regulation, noting that "[t]he principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation." 402 U.S. at 563. It further observed that, "where * * * dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565. The Court noted, however, that "[a] person thinking

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[2] There is no basis for petitioner's reliance (Pet. 22-23) on this Court's recent decision in *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). *X-Citement Video* involved a prosecution under the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2252. Defendants were charged with knowingly shipping visual depictions of a minor engaged in sexually explicit conduct. Although the Court held that the defendants' knowledge of the performer's minority was an essential element of the offense, it did not suggest that the government was required to prove that the defendants knew they were violating the law.

in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered." *Id.* at 563-564.

As this Court recently observed, "[b]y interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, [the Court] ha[s] avoided construing criminal statutes to impose a rigorous form of strict liability." *Staples* v. *United States*, 114 S. Ct. 1793, 1798 n.3 (1994) (citing *International Minerals*). But a defendant charged with a "public welfare offense" need not be shown to have understood either the illegality of his conduct or the specific facts that bring it within the reach of the criminal prohibition. It is sufficient if the evidence establishes that he had knowledge of the general nature and character of the materials with which he was dealing. *Ibid.*[3]

c. To interpret Section 1319(c)(2)(A)'s knowledge requirement in the manner advocated by petitioner would be especially unwarranted in light of the 1987

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[3] Petitioner's suggestion that "this Court should adopt precisely the bright line rule it declined to adopt in [*Staples*] and simply declare the public welfare doctrine inapplicable to felonies" (Pet. 24) provides no reason for this Court to grant review. The consequence of holding that felonies cannot be public welfare offenses would not be to require knowledge of illegality in every felony prosecution. *Staples* itself involved a felony, yet the Court did not require proof that the defendant knew his conduct to be illegal. Rather, the Court stated that, "to obtain a conviction, the Government should have been required to prove that [the defendant] knew of the features of his [firearm] that brought it within the scope of the Act," 114 S. Ct. at 1804—*i.e.*, that "the defendant kn[e]w the facts that make his conduct fit the definition of the offense," *id.* at 1798 n.3.

CWA amendments, which eliminated the prior reference to defendants who "willfully" violate the Act. See Pet. App. 14. In its 1987 amendments, see Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 42, Congress removed the word "willfully" from the statute's criminal provisions and substituted language essentially identical to that previously construed by this Court in *International Minerals*.[4] Because the pertinent statutory provisions regulate the disposal of "obnoxious waste materials," *International Minerals*, 402 U.S. at 565,[5] and because Congress is presumed to legislate with an awareness of existing law, see, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697, 699 (1979), the Act is properly construed to impose the same mental state requirement as was delineated by this Court in *International Minerals*.[6]

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[4] Petitioner contends (Pet. 14) that "the plain language of the statute"—*i.e.*, the use of the adverb "knowingly" to modify the verb "violates"—"compels the conclusion that what is required is that a person actually know he was violating the law." That argument cannot be squared with this Court's decision in *International Minerals*, in which precisely the same contention was made and rejected. Compare *International Minerals*, 402 U.S. at 562, with *id.* at 566-567 (Stewart, J., dissenting).

[5] The Act undeniably targets harmful and potentially harmful discharges. See, *e.g.*, 33 U.S.C. 1251(a) (objective of Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"); see also Pet. App. 14 (reviewing substantive provisions of Act designed to reach goal).

[6] Petitioner's reliance (Pet. 16) on the rule of lenity is therefore unfounded. This Court has emphasized repeatedly that the rule is not applicable unless there is a "grievous ambiguity" in the statute, *Huddleston* v. *United States*, 415

There is no basis for petitioner's reliance (Pet. 16-18) on the graduated penalties established by the 1987 statutory amendments. The Act establishes felony penalties for defendants who act with knowledge of the nature of their acts, makes it a misdemeanor to act negligently, and imposes strict civil liability for any failure to comply with the Act's requirements. Thus, contrary to petitioner's contention, the decision of the court of appeals does not conflict with the enforcement scheme of the Clean Water Act.

d. Even if Section 1319(c)(2)(A) did not define a public welfare offense, petitioner's claim would lack merit. As this Court recognized in *Staples*, the generally applicable *mens rea* requirement is "that the defendant know the facts that make his conduct fit the definition of the offense." 114 S. Ct. at 1798 n.3; see also *id.* at 1797 ("a conventional *mens rea* element * * * would require that the defendant know the facts that make his conduct illegal"); *id.* at 1805 n.3 (Ginsburg, J., concurring in the judgment). Petitioner does not contend, however, that he was unaware of the characteristics of the materials he disposed of or the circumstances of their discharge. Nor did he request a jury instruction to the effect that lack of knowledge of the relevant facts would preclude the

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U.S. 814, 831 (1974), such that even after a court has "seiz[ed] every thing from which aid can be derived" it is still "left with an ambiguous statute." *Staples*, 114 S. Ct. at 1804 n.17 (internal quotation marks omitted). Here, the use of statutory language essentially identical to that previously construed in *International Minerals*, coupled with the established presumption that Congress legislates with an awareness of existing law, provides a clear indication of Congress's intent.

imposition of criminal liability.[7] Rather, petitioner asserted at trial, and continues to argue in this Court, that Section 1319(c)(2)(A) requires knowledge that one's conduct is unlawful. That contention is without basis.

2. Petitioner's challenge to the other two counts of conviction (see Pet. 24) lacks merit for essentially the same reasons. Petitioner contends that Section 1319(c)(4), which subjects to criminal penalties any person who "knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter," requires knowledge of illegality. Because the word "knowingly" in a criminal statute presumptively refers to knowledge of the pertinent facts rather than to knowledge that one's conduct is unlawful, and because petitioner identifies no evidence in the text or history of Section 1319(c)(4) that would rebut that presumption, petitioner's claim does not warrant this Court's review.[8] Petitioner's challenge to his con-

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[7] The jury instruction on the Section 1319(c)(2)(A) count stated that petitioner would not be guilty of the offense if he acted "by mistake, accident, *ignorance of the facts*, or for other innocent reason." Pet. App. 8 (emphasis added). Although the court of appeals relied heavily on *International Minerals* and on the "public welfare" doctrine, we believe that the jury instructions given at petitioner's trial were sufficient even under the *Staples* standard. In any event, petitioner did not object to the instructions on the ground that they failed to require the jury to find that he had knowledge of the relevant facts. Rather, his sole objection was that the jury should have been required to find that he knew that the discharges violated the statute or the permit. See Pet. 12-13.

[8] Indeed, petitioner's principal textual argument with respect to Section 1319(c)(2)(A)—that use of the adverb "knowingly" to modify the verb "violates" indicates a congres-

spiracy conviction is therefore similarly without merit. See *United States* v. *Feola*, 420 U.S. 671, 686-692 (1975) (conviction under 18 U.S.C. 371 for conspiring to violate federal statute generally requires same level of intent as is required for the underlying substantive offense).

3. Petitioner cites no conflict in authority warranting this Court's review. The only other court of appeals to construe the word "knowingly" in Section 1319(c)(2)(A) also concluded that knowledge of illegality is not required. *United States* v. *Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995).

In interpreting similar pollution control statutes, the courts of appeals have also consistently rejected the contention that knowledge of applicable statutes and regulations is an element of the criminal offense. See, *e.g.*, *United States* v. *Wagner*, 29 F.3d 264, 265-266 (7th Cir. 1994); *United States* v. *Laughlin*, 10 F.3d 961, 965-966 (2d Cir. 1993) (citing cases), cert. denied, 114 S. Ct. 1649 (1994); *United States* v. *Dean*, 969 F.2d 187, 190-192 (6th Cir. 1992), cert. denied, 113 S. Ct. 1852 (1993); *United States* v. *Buckley*, 934 F.2d 84, 88 (6th Cir. 1991); *United States* v. *Dee*, 912 F.2d 741, 745 (4th Cir. 1990) (citing cases), cert. denied, 499 U.S. 919 (1991); *United States* v. *Hoflin*, 880 F.2d 1033, 1037-1038 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990). But see *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662, 668-670 (3d Cir. 1984) (dictum), cert. denied, 469 U.S. 1208 (1985). The courts of appeals have refused, moreover, to require knowledge of illegality even where the statute in question

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sional intent to require knowledge of illegality—is inapplicable by its terms to Section 1319(c)(4).

establishes criminal penalties for a person who "knowingly violates" a specified provision of law. See *Weitzenhoff*, 35 F.3d at 1284-1285; *Buckley*, 934 F.2d at 88; see also *United States* v. *Sherbondy*, 865 F.2d 996, 1002-1003 (9th Cir. 1988) (construing federal firearms control statute). Review of the issue would be especially unwarranted here, where Congress amended the CWA against the backdrop of this Court's decisions, and especially selected the word "knowingly" in preference to terminology that might connote a higher scienter standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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